93-622

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

No. 92-1818

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

CLYDE BELLECOURT,

Petitioner,

vs.

UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS, J. MICHAEL QUINLAN, THE FEDERAL MEDICAL CENTER, ROCHESTER, MINNESOTA, DR. MICHAEL TRUJILLO, CLIFF FRIESE, PETER CARLSON, DR. ALAN WYNNE, AND SARAH URRISTE,

Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Amendment precludes cruel and unusual punishment in the form of an easier and less efficacious treatment of a prisoner's serious medical needs.

2. Whether it is proper to depart from statutory criteria in medical malpractice actions by expanding the need for an expert Affidavit.

3. Whether the presumption of receipt upon mailing is applicable as related to the filing a Federal Tort Claims Act claim.

LIST OF PARTIES

The parties to the proceedings below include Clyde H. Bellecourt as Petitioner, who was Plaintiff in District Court and Appellant in the Eighth Circuit Court of Appeals.

The named Defendants are the United States of America; the Federal Bureau of Prisons; the Federal Medical Center, Rochester, Minnesota, where Mr. Bellecourt was confined at the time of the events herein; J. Michael Quinlan in his capacity as Director of Federal Bureau of Prisons; Dr. Michael Trujillo, Medical Director of Federal Medical Center, Rochester; Cliff Friese, Guard at Federal Medical Center, Rochester, Peter Carlson, Warden of Federal Medical Center, Rochester; Dr. Alan Wynne, the treating Physician, who

provided services to Plaintiff at the Federal Medical Center, Rochester; and Sarah Urriste, a Physician's Assistant at the Federal Medical Center, Rochester. Respondents were Defendants in District Court and Appellees in the Eighth Circuit Court of Appeals.

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Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

The Petitioner, Clyde H. Bellecourt, prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on July 19, 1993. The Petitioner's Petition for Rehearing was denied July 19, 1993.

OPINIONS BELOW

The United States District Court for the District of Minnesota issued its Order dismissing Plaintiffs Federal Tort Claim for lack of jurisdiction and granting summary judgment to the Defendants on the remaining claims. The Order appears at 784 F.Supp. 623 (D. Minn. 1992), and which is reprinted within Petitioner's Appendix at p. 23.

Petitioner made a timely appeal to the United States Court of Appeals for the Eighth Circuit. On May 14, 1993, a panel of the United States Court of Appeals for the Eighth Circuit issued its determination affirming the decision by the District Court. This Opinion is published at 997 F.2d 427 (8th Cir. 1993) and appears within the Appendix at p. 1. Petitioner petitioned for an en banc rehearing from the United States Court of

Appeals for the Eighth Circuit which on July 19, 1993, was denied. The Order denying the en banc hearing appears within the Appendix at p. 22.

JURISDICTION

The determination by the United States Court of Appeals for the Eighth Circuit is sought to be reviewed. The determination of the Eighth Circuit panel is published at 994 F.2d 427 (8th Cir. 1993) and contained within the Appendix. It was filed on May 14, 1993. The panel decision affirmed the determination of the District Court, which appears at 784 F.Supp. 623 (D. Minn. 1992). A Petition for Rehearing with Suggestion of En Banc consideration was filed with the Eighth Circuit and was denied on July 19, 1993.

Jurisdiction to review the judgment of the Eighth Circuit in this civil case

by writ of certiorari is conferred upon this Court by 28 U.S.C. §2101(c), in compliance with Rules 20 and 29.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The constitutional provision herein involved is the Eighth Amendment to the United States Constitution. It provides that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The statutory provisions herein involved are 28 U.S.C. §2671-2680 (the Federal Tort Claims Act) and Minnesota Stat. §145.682.

STATEMENT OF THE CASE

Plaintiff/Appellant/Petitioner Clyde H. Bellecourt ("Petitioner") seeks damages

for physical and emotional injury, together with pain and suffering incurred when he was denied treatment for a myocardial infarction (commonly termed a "heart attack") he was experiencing by the contract doctor and prison officials, while incarcerated at the Federal Medical Center, Rochester, Minnesota (FMC). He asserts violations of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671-2680, the Eighth and Fifth Amendments to the United States Constitution, and 42 U.S.C. §1981(c), 1985 and 1986. He additionally asserts a Minnesota State statutory medical malpractice claim under the pendant jurisdiction of the District Court.

At the Federal Medical Center, Rochester, on September 16, 1987, at approximately 12:30 a.m. Petitioner experienced severe pain in his chest and

right arm, and he was unable to close his right hand. (Appendix p. 179) (hereinafter "Appdx."). He instructed his cell mate to notify the prison office. (Appdx. p. 179).

Respondent Lieutenant Cliff Friese, responded to the call and Petitioner advised that he believed he was in the midst of a heart attack. Respondent Dr. Alan Wynne was summoned and examined Mr. Bellecourt. Mr. Bellecourt stated he believed he was experiencing a heart attack and specifically requested use of the cardiogram. (Appdx. p. 290). When asked about the severity of his pain Petitioner rated it a ten (10) on a scale of zero to ten (0 to 10). Dr. Wynne asked Mr. Bellecourt if he had experienced pain like that previously. Mr. Bellecourt said that he had been shot just below the heart in 1973, and that the pain was far worse than the pain of being shot. (Appdx. p.

180). Dr. Wynne administered two tablets of nitroglycerin which partially relieved the pain for a few seconds. Dr. Wynne then diagnosed the pain as indigestion and gastritis. Mr. Bellecourt became very upset because he was sure that he was having a very serious heart attack and that Dr. Wynne was refusing to test or treat him for it. Mr. Bellecourt advised that he had no problems digesting food and no medical history of stomach problems. He requested that he be taken to the hospital for an electrocardiogram. However, Dr. Wynne refused and advised Petitioner that he had only gastritis and gave him an antacid. (Appdx. p. 182). An electrocardiogram was available but Dr. Wynne declined to use it because it was in a different building and it was raining, and he was unfamiliar with the tunnel between buildings. (Appdx. pp. 264-265).

As the doctor and guard left the cell, Lieutenant Friese told Mr. Bellecourt to keep quiet unless he wanted to go to the "hole". (Appdx. p. 291).

Petitioner was in continuous pain throughout the night. He was afraid to go to sleep for fear that he would not awake. He eventually blacked out. (Appdx. p. 183).

Petitioner awoke the next morning in extreme pain and reported to the clinic at the institution at about 7:20 a.m. He met with, and informed, Respondent Sarah Urriste, a Physician's Assistant, of his pain. She asked him to rate his pain, and he rated it at an eleven (11) on a scale of zero to ten (0 to 10). She told him to have a seat in the waiting room and he would be taken care of. Petitioner was not seen by a doctor until almost two hours later when a dentist interceded and

secured medical attention. (Appdx. pp. 184-186). The existence of a heart attack was confirmed and he was taken to a hospital for treatment. (Appdx. p. 186). It was determined that one of his coronary arteries was closed (Appdx. p. 186). [1]/

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[1]/ The facts as relied upon by Petitioner as to events following his distress call are significantly different from those relied upon by the District Court and the panel. Both Courts reflect the Respondents' account of these disputed facts. Petitioner's account is supported by his claim (Appdx. p. 177) and Affidavit (Appdx. p. 285). The Courts departed far from the accepted rule by viewing the facts upon summary judgment in the light most favorable to Respondents. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Both Courts below ignored the facts presented by Petitioner and based their rulings on the facts presented by Respondents. Dr. Wynne's testimony was regarded as dispositive as to Mr. Bellecourt's pain and the interaction between them. (Appdx. pp. 68-69).

Dr. Wynne sought to distinguish his practice at FMC from that of an emergency room by stating that an electrocardiogram was not readily available. However, he also admitted that an electrocardiogram could have been brought to Mr. Bellecourt and was available. (Appdx. p. 266). Dr. Wynne's testimony that Mr. Bellecourt reported a low level of pain (Appdx. p. 260) is a disputed fact. Mr. Bellecourt states he reported his pain as a "10". Mr. Bellecourt states that he implored Dr. Wynne to treat him for a heart attack, take him to a hospital and have an EKG done. (Appdx. p. 181). Dr. Wynne does not include such an account in his interview.

The context of Dr. Wynne's visit, on the facts presented by Petitioner, clearly required for effective treatment the utilization of an available diagnostic tool to detect whether a heart episode was in progress. Petitioner in the middle of the night at 12:30 asked his roommate to notify the Lieutenant's office that he felt he was having a heart attack. (Appdx. p. 179).

Mr. Bellecourt stated he "was experiencing severe pain in my chest, my right arm and I was unable to close my right hand." Lieutenant Friese responded to his call along with several guards. Petitioner told Mr. Friese that he was experiencing pain in his chest and arm and had trouble closing his right hand. Mr. Bellecourt told Friese that "I was sure that I was having a heart attack." (Appdx. p. 179).

The Lieutenant in response to the emergency, had immediately radioed for help and shortly thereafter Dr. wynne appeared. Dr. Wynne kept asking Mr. Bellecourt to rate his pain on a scale of one to ten and Mr. Bellecourt rated it as ten. When Dr. Wynne began to diagnose the pain as gastritis, Mr. Bellecourt attempted to specifically rule that out by stating that he had "no problems digesting food" (Appdx. p. 181) and that it had been eight (8) hours since he had dinner. Mr. Bellecourt implored Dr. Wynne to take him to a hospital and to administer an electrocardiogram (Appdx. p. 181).

Mr. Bellecourt had a history of smoking of which Dr. Wynne was advised. (Appdx. p. 257). (Appendix of Appellee Wynne W-20).

Dr. Wynne admits that Bellecourt stated he was having chest pain and Dr.

Wynne suspected it was a heart problem (Appdx. p. 251). He states that he asked Bellecourt whether he had shortness of breath and Bellecourt said yes. Dr. Wynne states there was no family history of coronary problems. This is contradicted by the Referral Summary. (Appdx. pp. 196-198). [2]/

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[2]/ The District Court, rather than consider the facts in the light most favorable to Petitioner, quarrelled with Petitioner's facts stating as to Respondent Friese that "Lieutenant Friese had no reason to believe that plaintiff required additional assistance." (Appdx. p. 64) The Court ignored the facts that Petitioner reported severe pain, implored the doctor for help in treating his heart attack, and requested an EKG. They also ignored that Lieutenant Friese threatened Mr. Bellecourt. As to Physician Assistant Sarah Urriste who denied access to a doctor for several hours after Petitioner reported to the clinic, the District Court ignored the facts offered by Petitioner and concluded that treatment was given upon Mr. Bellecourt's arrival at the clinic.

Dr. Wynne's report of the visit with petitioner was accepted in its entirety without mention of the conflicting facts offered by Petitioner. The District Court found that Dr. Wynne "thoroughly examined" Petitioner, and that his "pain seemed to subside" and "determined that an EKG was unnecessary at that time." (Appdx. pp. 68-69). Petitioner's account was that his severe pain did not subside, there was no meaningful examination, and an electrocardiogram was not used because it involved transporting the patient or the equipment in the rain and was therefore

Petitioner mailed his administrative claim under the Federal Tort Claims Act to FMC on November 29, 1988. (Appdx. pp. 308-310). The Federal Defendants claim not to have received the claim, although several prison officials overheard conversations by other prison officials shortly after the date of mailing, related to the claim set forth within the Petition (Appdx. pp. 346-397). Petitioner initiated the instant action on September 18, 1989. Dismissal of the FTCA claim, and summary judgment in favor of Defendant as to all other claims, was ordered by the District Court on February 10, 1992. The Eighth Circuit affirmed on May 14, 1993. Mr. Bellecourt's Petition for Rehearing was

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inconvenient. (Appdx. pp. 264-265). The District Court's rendering of summary judgment with these facts in dispute and the Eighth Circuit Panel's acceptance of the version of disputed fact offered by the party seeking summary judgment, are an extreme departure from the established rule which requires this Court's attention.

denied July 19, 1993.

The instant Petition for a Writ of Certiorari is submitted to avoid conflict by the Eighth Circuit with other Circuit Court and Supreme Court precedent with regard to the Eighth Amendment and with regard to the standard for adequate presentment of Federal Tort Claims Act Claims. The instant Petition for Writ of Certiorari is also submitted to supervise the District Court and Eighth Circuit which have departed far from the usual course of judicial proceedings, as to Minnesota law regarding the requirement of an expert affidavit in proving a medical malpractice claim.

REASONS FOR GRANTING THE WRIT

A. The Eighth Circuit Decision Is In Direct Conflict With Supreme Court And Other Circuit Precedent As To Eighth Amendment Standards.

The Eighth Circuit Panel in its Order

of May 14, 1993 upheld the grant by the United States District Court, District of Minnesota, of summary judgment in Respondents favor. The Eighth Amendment prohibits the cruel and unusual punishment. The denial of appropriate medical treatment to a prisoner in serious medical need which results in unnecessary suffering or injury is prohibited by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97 (1978). It is therefore cruel and unusual punishment violative of the Eighth Amendment for a doctor within a prison to deny a patient an available electrocardiogram test when the patient is experiencing symptoms consistent with a myocardial infarction, and to abandon that patient to his cell in severe pain without treatment. This forms the basis of Petitioner's Eighth Amendment Claim against Respondents.

The Eighth Circuit Panel characterized events as a mere disagreement over treatment, not rising to an Eighth Amendment violation. The Panel found the belief of Dr. Wynne that he followed a reasonable course of treatment to be dispositive. The Panel did not address allegations against Respondents prison guard Friese and physician's assistant Urriste.

The cases cited by the Panel in support of its affirmance of the District Court determination as to the Eighth Amendment Claim were Estelle, supra; Smith v. Jenkins, 919 F.2d 90 (8th Cir. 1990); and Randall v. Wyrick, 642 F.2d 304 (8th Cir. 1981). However, in none of these cases is a doctor's belief as to the reasonableness of the course of treatment, regarded as dispositive for summary judgment.

The determination by the District Court and the Eighth Circuit departed significantly from Estelle, supra, and other Supreme Court precedent, thus requiring this Court's supervision.

In Estelle, supra, the Court set forth the standard for determining the existence of cruel and unusual punishment in the context of treatment of a prisoner's serious medical needs.

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," In re Kemmler, supra, the evils of most immediate concern to the drafters of the Amendment.

Estelle, supra, at 103.

Prevention of pain equivalent to torture, and possible lingering death, motivated Petitioner's pleas for medical attention. Mr. Bellecourt was abandoned

by Respondents Wynne and Friese overnight in his cell with an untreated myocardial infarction in progress. In reporting to the Prison Clinic the next morning he was required to wait by Respondent Urriste for over two hours without medical attention. He experienced severe pain with permanent injury resulting.

This Court in Estelle, supra, distinguished cases of simple negligence from those rising to a constitutional violation. The Court stated that deliberate indifference can be "manifested by prison doctors in their response to the prisoner's needs". Estelle, supra, at 104. Therefore, the Court made clear that not only lack of treatment but the manner of a the course of treatment could rise to a constitutional violation.

The Court in Estelle, supra, cited several cases as examples of deliberate

indifference being apparent through utilization of "easier and less efficacious treatment" in response to a patient's serious medical needs, thus leading to an Eighth Amendment violation. The Court cited Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974), in which a prisoner's severed ear was treated but not reattached; Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974) in which an injection of penicillin was administered to a prisoner known to be allergic to penicillin; and Martinez v. Mancusi, 443 F.2d 927 (2nd Cir., 1970), wherein a prison physician failed to administer a pain killer in connection with leg surgery. The above each respectively illustrate indifference to the patient's serious medical needs by selection of an easier and less efficacious course of treatment. The stated belief of the respective physicians

as to what constituted reasonable care was not dispositive of the claims asserted. Rather, each Court determined the scope of proper inquiry to determine whether an Eighth Amendment violation had occurred.

In abandoning the "easier and less efficacious" standard the Courts below failed to follow Supreme Court precedent and placed themselves in conflict with the other Circuits.

The Panel below also cited as controlling Randall, supra in which the Eighth Circuit found, "Appellant's difference of opinion over matters of expert medical judgment or prescribed course of treatment fails to state a federal constitutional question." Id. at 308. In Randall, supra, a prisoner with mild bursitis and back pain, was regularly treated utilizing a medically accepted course of treatment as to which he

disagreed. The Court found deliberate indifference was absent.

Randall, supra, bears no relation to the instant case in which there was a deliberate failure to utilize an available electrocardiogram to determine whether a heart attack was in progress. This constituted an abandonment of the patient during an emergency. The medically accepted course of treatment through utilization of an available diagnostic tool was not followed. (See, Opinion of Dr. Leupker, Appdx. p. 338). Dr. Wynne's beliefs do not mitigate his failure to utilize available diagnostic equipment nor the resulting grossly negligent misdiagnosis and abandonment while aware of symptoms reported by Petitioner, which were consistent with a myocardial infarction.

The patient called for medical assis-

tance stating that he believed he was having a heart attack and specifically requested an EKG while reporting the classic symptoms of a myocardial infarction. Dr. Wynne refused to test for a heart attack because the available electrocardiogram equipment was in another building, it was raining outside and he did not know of the tunnel connecting the two buildings (Appdx. pp. 264-265). Rather than arrange for a test for a myocardial infarction he chose to make the easier test for gastritis, and thereafter left Petitioner when he responded only slightly and briefly to simple medication. In choosing the easier and less efficacious treatment, Dr. Wynne deliberately chose not to test for a myocardial infarction or rule out the life-threatening alternative. He was indifferent to Mr. Bellecourt's plea for emergency assistance for a myo-

cardial infarction in progress.

The Panel did not address the standards for finding an easier and less efficacious treatment as cruel and unusual punishment but rather chose to characterize events as a mere misdiagnosis and as a disagreement over treatment. The Panel's silence on this central inquiry, signals an abandonment of such analysis, thereby placing the Eighth Circuit in conflict with Supreme Court precedent and the other Circuits.

The Fourth Circuit in Miltier v. Beorn, 896 F.2d 848 (1990), a strikingly similar case involving a prisoner's heart attack in a Virginia prison, reversed the summary judgment of the District Court to permit the trial to proceed to determine whether Defendant physicians had engaged in deliberate indifference contrary to Eighth Amendment requirements. The

doctors in that case had been aware of the patient's complaints of chest and arm pain but made no follow-up.

In Miltier, supra, the Fourth Circuit cited as precedent the determination by the Eleventh Circuit in Ancata v. Prison Health Services, Inc., 769 F.2d 700, 107 (11th Cir. 1985) which held that, "Intentional failure to provide service acknowledged to be necessary is the deliberate indifference proscribed by the Constitution." The Fourth Circuit in Miltier, supra, found a triable jury issue in the fact that the several doctors who tested the patient did not "perform the necessary diagnostic testing to rule out arteriosclerotic coronary heart disease." Miltier, supra, at 851. One Defendant doctor had "continued to treat her symptoms as non-cardiac related and failed to order a cardiac evaluation." Id. at

853. The patient eventually suffered a cardiac arrest without having been tested for heart problems.

In the instant case, the patient, Mr. Bellecourt, was in the very midst of a myocardial infarction when the doctor failed to test for or rule out coronary heart disease. Dr. Wynne had been summoned in the middle of the night for the specific purpose of treating a myocardial infarction in progress. He performed none of the necessary testing to rule out a cardiac episode and treated the symptoms as non-cardiac related gastritis. He failed to order a cardiac evaluation. An electrocardiogram was available and not used. Dr. Leupker advises that an EKG is a necessary diagnostic procedure for a patient presenting the symptoms of Mr. Bellecourt. (Appdx. pp. 342-343).

In Ancata, supra, the Eleventh

Circuit, considered a case where a prisoner had complained of several symptoms including severe pain, hyperventilation and double vision. He was treated with Ben Gay and Tylenol II. A Court-ordered referral to a neurologist resulted in a diagnosis of leukemia from which the prisoner subsequently died.

In Ancata, supra, at 704, the Eleventh Circuit adopted the Eighth Amendment standard stated by the Third Circuit in West v. Keve, 571 F.2d 158, 162 (1978)(citations omitted):

> "Although the Plaintiff has been provided with aspirin, this may not constitute adequate medical care. If "deliberate indifference caused an easier and less efficacious treatment" to be provided the Defendants have violated the Plaintiff's Eighth Amendment rights by failing to "provide medical care."

The Eleventh Circuit in Ancata, supra, found triable facts as to whether

deliberate indifference was exhibited through utilization of an easier and less efficacious treatment.

In Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989) a prison psychiatrist, following an interview with a prisoner, determined that the patient was in remission from depression and halted medication. The patient had nightmares and nausea, and returned for a follow-up interview. The patient was not returned to medications. The patient then gouged out his left eye and was placed on medication, but not lithium which is specifically used to treat depression. The Eleventh Circuit held that there were disputed issues of fact and upheld the denial by the District Court of summary judgment.

The psychiatrist argued essentially what the Eighth Circuit panel determined

in the instant case; that if a doctor actually treats the prisoner, then the Eighth Amendment has not been violated. The Eleventh Circuit held, however, that "grossly incompetent medical care or choice of an easier but less efficacious course of treatment" can constitute deliberate indifference. Id. at 1033. The existence, nature and degree of the omission and whether it rose to an Eighth Amendment violation was characterized as a contested fact issue to be decided at trial.

In the instant action there is a factual dispute regarding the nature of the omissions of Dr. Wynne. Plaintiff's expert, Dr. Russell Vincent Leupker is Director of the Division of Epidemiology, School of Public Health, University of Minnesota and a Professor of Epidemiology and Medicine at the School of Public

Health and Medical School of the University of Minnesota. He specifies within his affidavit that Dr. Wynne's behavior constituted an abandonment of treatment. (Appdx. p. 340). Respondents argued that Dr. Wynne treated Mr. Bellecourt within established medical procedures. The Courts below found the expressed belief of the doctor to be dispositive. In contrast, the Eleventh Circuit in Waldrop, supra, in similar circumstances found a factual dispute.

The facts presented by Mr. Bellecourt, taken in the light most favorable to his position, unquestionably present a prima facie case of an Eighth Amendment violation. The Eighth Circuit ruled in essence that medical treatment, even though easier and less efficacious cannot rise to deliberate indifference even if available diagnostic equipment was

unreasonably not utilized.

In Boretti v. Wiscomb, 930 F.2d 1150 (6th Cir. 1991) a prisoner was denied changes of dressing for a wound. The Sixth Circuit found causation of resultant unnecessary suffering constituting an Eighth Amendment claim. It relied upon its earlier case of Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976) in which it held that a prisoner may assert an Eighth Amendment claim arising from deliberate indifference to a serious medical need when forced to suffer needlessly when relief is readily available, but treatment is delayed. Westlake was cited in Estelle, supra, at 429 U.S. at 103, 97 S.Ct. at 290, as an example of a claim of unnecessary suffering. The Sixth Circuit, also in Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986) held that an actual injury is not a necessary prerequisite to

recovery of damages where physical pain or mental anguish is suffered.

The Panel in the instant action upheld without discussion the erroneous determination by the District Court that the delay in treatment did not rise to an Eighth Amendment claim. The District Court below cited in support of its decision Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990) a case involving a delay in treatment which was causative of pain but where the prisoner was treated with pain relievers. In the instant action, the attempt at pain relief by utilization of an antacid demonstrably failed. The Petitioner experienced and reported high levels of pain which went untreated. He was abandoned in severe pain.

The Panel determination affirming the District Court grant of summary judgment is also in conflict with the Ninth

Circuit. In the instant action, the Courts below found that evidence offered by Defendants of some treatment establishes the absence of an Eighth Amendment violation. In Ortiz v. City of Imperial, 884 F.2d 1312 (9th Cir. 1989), the Ninth Circuit in reversing summary judgment against a Plaintiff, held that Plaintiff "need not prove complete failure to treat." Quoting a previous case, the Court stated "access to medical staff is meaningless unless that staff is competent and can render competent care." Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988).

In Ortiz, doctors were alerted to a head injury received by a prisoner but they did not perform an examination and chose to treat for symptoms of alcohol withdrawal. In the instant action the doctor was aware of reported symptoms

consistent with a myocardial infarction and did not test for cardiac problems, but rather treated for gastritis over the prisoner's protestations. Treatment for gastritis is entirely ineffective and incompetent for a myocardial infarction.

In West, supra, the prisoner suffered from ankle joint thickening and varicose veins. An operation to correct the condition was delayed seventeen (17) months. The prisoner unnecessarily suffered great pain as a result. The prisoner after the operation was treated with aspirin for his pain, and was denied access to a physician. The Court found that even though the prisoner was receiving post-operative care, the issue whether he was being denied adequate care due to deliberate indifference to his needs, was an issue for trial upon his claim of Eighth Amendment violation. The

determination as to which review is sought herein is clearly at odds with Third Circuit precedent.

In Martinez, supra, a prisoner who had undergone surgery as to his right leg was required to walk by prison guards and physicians, despite the orders of his surgeons, and was denied prescribed pain killers. This denial of adequate care resulted in physical pain and mental anguish. The Second Circuit deemed the issues sufficient for trial, and thus reversed the dismissal of Plaintiffs claim by the District Court. In contrast, the Courts below found that the denial of testing as to Petitioner was merely a disagreement over treatment.

In Williams, supra, a portion of a prisoner's ear was cut off during a fight with another prisoner. The doctor chose not to reattach the severed portion. The

Second Circuit reversed the summary judgment in favor of Defendant doctor entered by the District Court, stating that because there was a possibility that "deliberate indifference caused an easier and less efficacious treatment to be consciously chosen by the doctors" summary judgment was inappropriate. [3]/

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[3]/ Each Circuit Court of Appeals recognizes the deliberate indifference standard for the Eighth Amendment. The Seventh Circuit in Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985), recognized the deliberate indifference standard where a prisoner was confined for nine days in body restraints because he was suspected of being suicidal. The restraints caused itching, headaches, and a rash. No medical assistance was offered. The Seventh Circuit reversed summary judgment because the prisoner was deprived of exercise, clothing and because of the unsanitary condition of his cell.

The Fifth Circuit in Partridge v. Two Unknown Police Officers of the City of Houston, Texas, 751 F.2d 1448, opinion withdrawn 755 F.2d 1126, opinion substituted 791 F.2d 1182 (1985), recognized that failure to take steps to save a suicidal prisoner from injuring himself may evince deliberate indifference.

The Tenth Circuit in Garcia v. Salt Lake County, 768 F.2d 303 (1985), upheld an award to the estate of a deceased who had died while in custody on a drug overdose. No medical personnel were available in the jail to treat him. He was unconscious and received first aid only.

The First Circuit in Watson v. Caton, 984

In the instant action, Respondent Dr. Wynne chose an easier and less efficacious treatment. The Eighth Circuit, and the District Court abandoned the appropriate analysis to determine the existence of an Eighth Amendment issue and found no triable issues. Dr. Wynne's treatment through administering an antacid rather than performing an electrocardiogram was an easier and less efficacious treatment because it was inconvenient to transport the patient or EKG in the rain and he was not aware of a tunnel between buildings.

The Eighth Circuit in the instant case has abandoned Supreme Court precedent and is in conflict with the other circuits. The Eighth Circuit also has abandoned, without distinguishing, its own

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F.2d 537 (1st Cir. 1993), vacated dismissal of a claim where a prison nurse refused treatment to a prisoner's injured hand which subsequently required surgery, finding that deliberate indifference may be found on such facts.

precedent. [4]/

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[4]/ Recent Eighth Circuit cases illustrate the Supreme Court rule from which the instant Panel decision is a radical departure.

In Robinson v. Moreland, 655 F.2d 887 (8th Cir. 1981) the Eighth Circuit upheld a verdict finding deliberate indifference wherein a prisoner complained of a broken hand that was initially treated with ice. A physician several days later diagnosed the hand as badly bruised, but did order an x-ray, which revealed a fracture. It is highly aberrant that the Panel would deny a trial to the victim of a heart attack, initially treated with an antacid, and not diagnosed until the following day, while available EKG equipment was not utilized.

In Mullen v. Smith, 738 F.2d 317 (8th Cir. 1984) a prisoner tripped and injured his back and head. He received no substantive medical attention for four hours. His condition was not properly diagnosed, and he was given valium. Suggestions for testing and treatment were ignored. On those facts the Eighth Circuit reversed dismissal by the District Court which had found that the prisoner had merely disagreed with the course of treatment.

In White v. Kelsey, 935 F.2d 968 (8th Cir. 1991) the Eighth Circuit affirmed a District Court judgment in favor of a prisoner finding deliberate indifference where immediate treatment for a broken ankle was inadequate. The doctor set a broken ankle without anesthetic and without securing an x-ray to determine alignment.

In Fields v. Gander, 734 F.2d 1313 (8th Cir. 1984) a prisoner experienced dental pain. His treatment was delayed three weeks until payment was received. The Eighth Circuit reversed summary judgment in favor of the dentist.

In Toombs v. Bell, 798 F.2d 297 (8th Cir. 1986) a prisoner experienced pain and swelling beneath his ribs and was told at sick call that nothing was wrong. He, in fact, had developed gallstones which were treated after he passed out from the pain. Again, the Eighth Circuit reversed

The decision of the Panel, if allowed to stand, would constitute a radical departure from prior decisions by this Court and in the Circuits, in that it would exempt grossly negligent misdiagnosis utilizing easier and less efficacious treatment from the Eighth Amendment prohibition against cruel and unusual treatment. A new rule would be established that a grossly negligent diagnosis resulting in ineffectual treatment is outside of Eighth Amendment protection, as long as the treating physician expresses a belief that he or she is following a regular course of treatment. However, whether a reasonable

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the District Court dismissal noting, "This Court has reversed and remanded dismissals of prisoner's claims perhaps less grave then the one at issue. See, e.g. Mullen v. Smith, 738 F.2d 317 (8th Cir. 1984)(head injury untreated for four hours then valium given to prisoner); Cummings v. Roberts, 628 F.2d 1065 (8th Cir. 1980)(back injury untreated for three days)." Id. at 298.

or a cruel and unusual course of treatment has been utilized is a factual question. Moreover, to accept a physician's contested belief that he utilized reasonable care as dispositive on summary judgment clearly violates established standards of this Court.

B. **The Rendering Of Summary Judgement On Petitioner's Medical Malpractice Claim For Lack Of An Expert Affidavit Is A Radical Departure From Precedent, Requiring The Court's Supervision.**

Minnesota Statute §145.682, Subd. 2, generally requires that a Plaintiff in a malpractice action to furnish an Expert Affidavit, but only where "expert testimony is necessary to establish a prima facie case".

In its Order of May 14, 1993 (Appdx. p. 19), the Panel did not reference Eighth Circuit precedent which directly contradicts its affirmance of the District

Court. The Court cited for support a Minnesota case, Todd v. Eitel, 237 N.W.2d, 357 (Minn. 1975), which did not involve a negligent diagnosis.

The controlling case regarding expert affidavit requirements as to negligent diagnosis in the Eighth Circuit is Chizmadia v. Smiley's Point, 873 F.2d 1163 (8th Cir. 1989) which interpreted Minnesota law. Chizmadia involved the misdiagnosis of a detached retina. The Eighth Circuit held that a negligent diagnosis could be established within lay comprehension and accordingly, expert testimony was not necessary to prove a negligent misdiagnosis. [5]/

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[5]/ The Eighth Circuit, in Chizmadia, supra, at 1165, noted that misdiagnosis does not necessarily require expert testimony to establish a prima facie case. The Court quoted the controlling Minnesota case, Hestbeck v. Hennepin County, 297 Minn. 419, 424, 212 N.W.2d. 361, 364 (1973):

> Expert testimony is not necessary where the matters to be proved fall

within an area of common knowledge and developing lay comprehension of medical techniques and where the results of surgical or medical treatment viewed in the light of all the circumstances, provide a sufficient evidentiary basis to support an inference of negligence.

The grant of summary judgment in Chizmadia, by the District Court was found to be erroneous by the Eighth Circuit in that the lower Court did not make a full inquiry as to whether the alleged negligence of the Defendant doctor in failing to diagnose a detached retina fell within the area of common lay knowledge established in State and Minnesota cases:

> It is possible that the allegedly negligent failure to diagnose Chizmadia's detached retina falls within the area of common knowledge or lay comprehension. For example, Chizmadia's injury may have been obvious or recognizable to the degree that a negligent failure to diagnose can be demonstrated without expert testimony. Also, if the alleged malpractice does not fall within an area of common knowledge or lay comprehension, there are methods by which a plaintiff can show malpractice without securing his or her own expert to testify. For instance, Chizmadia might establish his case through his medical records, see Betzold v. Sherwin, 404 N.W.2d 286, 288 (Minn. Ct. App. 1987), with the aid of medical treatises, see Smith v. Knowles, 281 N.W. 2d at 656 n.4; Lutz v. Estate of Hillier, 574 F. Supp. 1032, 1034 (S.D. W. Va. 1983) (denying a motion for summary judgment in an action alleging negligent failure to diagnose where plaintiffs failed to provide their own expert witness). Because the district court did not

Chizmadia's eye condition, diagnosis and treatment history were significantly more complex as to appreciation by the general public than the facts related to the heart attack of Mr. Bellecourt. [6]/

Mr. Bellecourt, in contrast, was in the midst of an acute crisis. The symptoms of a "heart attack" were known to Mr. Bellecourt, who as a lay person made a correct diagnosis and so informed Dr. Wynne. The hospital facility was equipped and prepared for such an emergency. Mr.

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determine whether expert testimony was necessary in this case, we find that the order granting summary judgment was erroneous.

Chizmadia was treated over the course of two months by several doctors. No definitive diagnosis was made until it was discovered he had a detached retina. Surgery was unsuccessful resulting in blindness, the causation of which Chizmadia attributed to the delay in treatment.

Chizmadia, supra, at 1165.

[6]/ On remand, the District Court did not require expert testimony to establish a prima facie case. Chizmadia v. Smiley's Point Clinic, 726 F. Supp. 249, 252 (D. Minn. 1989).

Bellecourt's crisis was immediate. The Courts below did not appreciate that the public has a common understanding that EKG testing is appropriate when cardiac symptoms are reported.

The Courts below did not consider possible means of proof permitted by Minnesota law of Petitioner's malpractice claim in the absence of expert testimony. Rather, they erroneously concluded without discussion of Hestbeck, Betzold, or Smith, supra, as to the means of alternative proof available, that expert testimony was required. (Appdx. pp. 17-20; 84-93).

The affidavit submitted by Dr. Russell Leupker illustrated that proof of malpractice in this case is not complex.

> Medical intervention during the first few hours can limit or reverse damage. There exists a number of medical and surgical procedures that are available. Effective intervention can normally take place if accom-

> plished within the first three to four hours after the onset of chest pain. The failure to accomplish appropriate intervention during this interval is recognized to be harmful and risky to a patient. Thus, immediate medical care is viewed as necessary upon the onset of a myocardial infarction. Increased physical damage to the heart and arteries may increase the likelihood that a future episode will occur, and the likelihood that upon such occurrence an episode will be of greater severity.

(Appdx. p. 342).

Chizmadia, supra, was followed by the Eighth Circuit in Vakil v. Mayo Clinic, 878 F.2d 238 (8th Cir. 1989), wherein a Plaintiff, claimed malpractice as to her treatment for injuries sustained in an automobile accident. Vakil did not submit an Affidavit of Expert Review. The Defendant requested Summary Judgment for breach of Minn. Stat. §145.682. The Eighth Circuit, citing Chizmadia, supra, stated at p. 239,

> The applicability of this Minnesota Statute is conditioned upon a finding that expert testimony is necessary to establish a prima facie case of malpractice.

The Minnesota Courts have spoken to the same effect. [7]/

The District Court below found that expert testimony would be required to prove causation and damage to "provide

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[7]/ In Bauer v. Friedland, 394 N.W.2d 549 (Minn. App. 1986), the Minnesota Court of Appeals stated at p. 553:

> Minnesota has long recognized that in some cases liability may be established without expert testimony. Expert testimony is not necessary where the facts to be determined are within the common knowledge of the jury and where the results of the surgical or medical treatment, viewed in the light of all circumstances, provide a sufficient evidentiary basis to support an inference of negligence.

To the same effect, see Todd, supra; Christy v. Saliterman, 179 N.W. 2d 288 (1970); Muehlenbrok v. Park Davis and Co., 145 Minn. 100 176 N.W. 169 (1920).

Apart from expert opinion, if circumstantial evidence furnishes a reasonable basis for the inference that a doctor's negligence caused the injury, the case should be submitted to the jury. Miller v. Raaen, 139 N.W.2d 877 (Minn. 1966); and Jensen v. Linner, 260 Minn. 22, 108 N.W.2d 705 (1961).

some basis for the jury to quantify that injury". (Appdx. p. 92). The Court considered only the quantification of heart damage and not the pain and suffering experienced by Appellant during his night of terror while he was, in his view, being neglected and left to possibly die. Expert testimony to appreciate this pain is clearly not required. The District Court further failed to consider that causation and damage might be established through Appellee Wynne or through utilization of medical treatises.

In Lutz v. Hillier, 574 F.Supp. 1032 (1983), cited with approval in Chizmadia, supra, the proposed examination of Defendant's expert witnesses at trial was found sufficient to establish proof of standard of care, thereby permitting Plaintiff to survive a summary judgment motion as to his medical malpractice

claim. [8]/

In Betzold v. Sherwin, 404 N.W.2d 286 (Minn. App. 1987), cited in Chizmadia,

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[8]/ In Smith v. Knowles, supra, also cited in Chizmadia, supra, a Defendant doctor was cross-examined as to standard of care, and his testimony was corroborated by excerpts from several treatises. The Court concluded that the showing was sufficient to establish the prima facie element of standard of care. The Court cited as precedent Larson v. Belzer Clinic, 292 Minn. 30, 195 N.W.2d 416 (1972); and Anderson v. Florence, 288 Minn. 351, 181 N.W.2d 873 (1970). In Larson, the Court permitted adverse examination of the defendant doctor for expert testimony as to malpractice elements.

In Anderson, utilization of pretrial interrogatories eliciting the defendant's doctor's expert opinion as to the standard of care and defendant's deviation from such were permitted. The syllabus by the Minnesota Court at p. 874 states that

> "In malpractice actions, Rule 26.02 and 43.02 Rules of Civil Procedure governing the scope of trial discovery and cross examination of an adverse party, authorized the trial court to compel a defendant physician, when qualified as an expert, to answer pretrial interrogatories calling for his expert medical opinion."

Reinhardt v. Colton, 337 N.W. 2d 88 (1983) involved the diagnosis of rheumatoid arthritis and administration of the drug penicillamine, which had the side effect of causing anemia which was not explained to the patient at the time of the treatment. The Minnesota Supreme Court held that "a plaintiff in a malpractice action may establish his claim with expert testimony elicited solely from the defendant doctor." The testimony was found sufficient to establish the standard of care.

supra, medical records were found to be an essential aspect of proving causation as to the medical malpractice cause of action asserted by Plaintiff. In Pomani v. Underwood, 365 N.W.2d 286 (Minn. App. 1985), hospital rules were permitted to prove a prima facie case of medical malpractice as to the standard of care. As authority the Court cited Boland v. Garber, 257 N.W.2d 384 (Minn. 1977), wherein hospital rules were permitted as evidence of accepted practice in the medical community.

In Fowler v. Scheldrup, 166 Minn. 164, 207 N.W. 177 (1926) metal clips were unintentionally left in the patient after surgery. Such negligence, the Court found was within the scope of a lay jury without an expert's explanation. In Baer v. Chowning, 135 Minn. 453, 161 N.W. 144 (1917), a sponge was not removed during

surgery. The Court did not require expert testimony to explain the negligence. In Holt v. Ten Broek, 134 Minn. 458, 159 N.W. 1073 (1916), and in Jones v. Tri-State T.&T. Co., 118 Minn. 217, 136 N.W. 741 (1912), a burn resulted from the improper use of x-ray equipment.

The transcript of an interview of Dr. Wynne (Appdx. pp. 233-284), and Mr. Bellecourt's medical records (Appdx. pp. 192-232), are sufficient to establish a prima facie case capable of factual resolution at trial, even should other available evidence be seen as insufficient. [9]/

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[9]/ Assistant U.S. Attorney Lonnie Bryan questioned Dr. Wynne on October 30, 1989, in the presence of a Court Reporter. (Appdx. p. 233). Within Dr. Wynne's interview, the prima facie elements of Appellant's case are presented as to standard of care, deviation from this standard and causation. Dr. Wynne states, "as any internist knows, cardiac ischemia, most symptoms, can present in a whole lot of different ways ... the threshold or index of suspicion has to be low for looking at any symptom that might be heart pain ..." (Appdx. p. 258) Dr. Wynne further states, as to standard

of care and causation: "it is important that the patient is pain free because if the patient is still having any pain at all, and if it is heart pain, then there is a risk that the patient is having ongoing ischemia or lack of blood flow to the heart and potential heart damage from that." Further, "its just important that the patient is quick to let us know if there is any recurrence of chest pain." (Appdx. pp. 262-263)

Yet, Mr. Bellecourt reports that he was left in pain in his cell, afraid to seek further assistance. Dr. Wynne confirms that Mr. Bellecourt complained of chest pain and a possible heart attack (Appdx. p. 251). Accepting such facts as true, pursuant to the standard for summary judgment, one would find in Mr. Bellecourt's treatment a significant deviation from the standard of care outlined by Dr. Wynne.

As to the use of the electrocardiogram and causation. Dr. Wynne states, "if he had already started to infarct, which we later find out he did have heart problems, if he had already started to have damage to his to his heart then we could have seen some signs on the electrocardiogram." Dr. Wynne further presents a detailed explanation of the expected results gained by use of an electrocardiogram. (Appdx. pp. 273-275) When Dr. Wynne was asked whether heart damage might have been occurring during his visit with Mr. Bellecourt, as part of a so-called "silent heart attack", he answered candidly, "looking at all the data in retrospect, probably so ..." (Appdx. p. 281).

It may or may not be that Dr. Wynne believes that the medical attention he offered Mr. Bellecourt deviated from the standard of care common in the medical profession. His responses within his October 30, 1989 interview, however, are such that a prima facie case of such a departure, causing injury to Plaintiff is presented, upon which a jury could conclude that medical malpractice did indeed occur. (Appdx. p. 233).

In an Affidavit received by Plaintiff's

Contrary to Minnesota and Eighth Circuit precedent the Courts below did not consider whether testimony by Defendant doctor, utilization of learned texts or alternative means of proof might provide appropriate information capable of lay understanding. The District Court summarily concluded, that the Panel let stand, a finding that no such means could amount to sufficient proof. Such represents a radical departure from the controlling law.

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attorneys, an informant states that Appellee Lieutenant Friese told him institution policies were not followed in regard to Bellecourt's complaints. (Appdx. p. 328).

Medical records have been submitted showing that Mr. Bellecourt was admitted to St. Mary's Hospital and treated for a myocardial infarction. (Appdx. p. 192). These records together with Dr. Wynne's statement furnish evidence sufficient to demonstrate community standards. Further, other evidence through hospital rules, treatises, the individual Appellees or Appellee's witnesses are additionally available during discovery or at trial.

C. The Determination Below Regarding Presentment Of Petitioner's Federal Tort Claims Act Claim Is In Conflict With Supreme Court Precedent.

The District Court and the Eighth Circuit both declined to rule that the Bureau of Prisons received Mr. Bellecourt's Administrative Claim pursuant to the Federal Tort Claims Act. The holdings are in direct contradiction to a United States Supreme Court decision in Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417 (1932), in which the Court stated the rule of presumption of receipt upon mailing. Further, they depart from Eighth Circuit precedent as to burden of proof as to receipt. The District Court termed as speculative (Appdx. p. 40) Petitioner's proof which, according to precedent, is more then sufficient to prove receipt by a preponderance of the evidence.

The District Court insisted that the burden is "actual receipt", disregarding caselaw which confers a presumption of receipt upon proof of mailing. The District Court accepts the fact of mailing stating that Appellant has shown that such occurred ("Once you can show that you have mailed it - which I think you have done, and I don't think even Mr. Bryan disagrees with that") (Appdx. p. 411). However, without citing caselaw, the Court placed FTCA claims as being outside the normal rule concerning presumption of receipt of United States mail. In this the District Court erred, and the Eighth Circuit Panel erred in its affirmation. The District Court stated that the Petitioner must show "that Federal Medical Center actually received his administrative claim: Presumption of receipt is not sufficient to withstand the federal defendants'

motion to dismiss". (Appdx. p. 39).

In Hagner, supra, at 430, 431, the United States Supreme Court held "The rule is well settled that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed ...".

Petitioner submitted affidavits proving that the claim was properly mailed and thereby established a presumption of receipt. The District Court, indeed, specifically found the claim was mailed. (Appdx. p. 411). Mr. Bellecourt also submitted deposition evidence of Dr. Daniel Foster (Appdx. p. 351), and John Chreno (Appdx. p. 387), officials at the Federal Medical Center (FMC), Rochester, who testified they overheard discussions regarding the facts contained within the

written claim shortly after the mailing. The Federal Defendants, however, denied receipt. The District Court considered the flat denial of receipt as dispositive, rather than utilizing the appropriate presumptions and properly weighing the evidence of receipt.

A preponderance of evidence as to receipt is required to prove receipt. Legille v. Dann, 544 F.2d 1(D.C. Cir. 1976). Such corroborative evidence may be provided by various means such as by witnesses, by the failure of the mailing to be returned to its sender by the post office, by proof of prior mailing and by proof that the mailing was suspected. All of the above means of corroborative evidence were presented by Petitioner.

Deposition evidence shows that FMC official, Dr. Daniel Foster, had information indicative of FMC's receipt of

Appellant's claim. Dr. Foster, the Chief Psychologist at FMC, overheard a discussion concerning Appellant among several FMC Department Heads shortly after the claim was mailed. Dr. Foster overheard a conversation regarding Mr. Bellecourt's claim in which he learned "that Mr. Bellecourt was filing" and that "the lawsuit was anticipated". (Appdx. p. 363).

A second deponent, John Chreno, an executive assistant to the Warden at FMC remembered "general discussions about the claim at a Department Head meeting," which he attributed to a newspaper article. (Appdx. p. 390). Mr. Chreno stated that the discussions were among the executive group, but he did not remember precisely when in the fall of 1988 these took place. He also said he believed that the news report mentioned the filing of Mr.

Bellecourt's claim. An affidavit submitted by computer researcher Ray Howe, Director of Research Unlimited in Rochester, Minnesota (Appdx. p. 399) establishes, however, that no article on this subject appeared in any Minnesota daily newspaper between October 1988, and January 1989. Thus, it is likely that the discussion was occasioned by the receipt of the actual claim. Another deponent, Juli Alba relates that there was a general assumption in the institution in late 1988 that Mr. Bellecourt was going to file a legal action (Appdx. p. 346).

To establish a jurisdictionally adequate presentment of his claim, Appellant is required to show, by a preponderance of the evidence that his Administrative Claim was received. McNutt v. U.S., 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L. Ed. 1135 (1936); Zunamon v.

Brown, 418 F.2d 883 (8th Cir. 1969). In this effort he is entitled to rely upon the presumption of receipt upon mailing. Hagner, supra, and indirect evidence of receipt. [10]/

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[10]/ In United States v. Freeman, 402 F.Supp. 1080 (E.D. Wisc. 1975). The Plaintiff, showed that other similar mailings had been received at the Defendant's address by Defendant. Also, Defendant had not shown that the Order was not delivered by the Post Office or that it was returned to the sender unopened. Defendant's mere assertion of non-receipt, without more, was outweighed by the proof of mailing and of the circumstances indicating likely receipt.

In Hoffman v. U.S., 398 F.Supp 530 (1975), a claim was mailed to the FAA and CAB. The agencies denied that receipt was timely. The Court agreed with the Claimant that "there are all sorts of problems involved in relying on someone to stamp a claim in ...". Id. at 540. The Court found that the affidavits submitted by Defendants were insufficient to explain the events that may have occurred upon receipt and the Affiants did not speak from personal knowledge. The Court refused to deny that proper presentment had occurred.

In Solberg v. Secretary of Department of Health & Human Services, 583 F.Supp. 1095 (E.D. Wisc. 1984), the Plaintiff asserted she did not receive Government Notices that cancelled her disability payments. Her assertion, based on statements by herself and her father, was found insufficient to rebut the presumption of delivery given circumstantial evidence concerning the likelihood of receipt. The Government had made other effective mailings to her address and she had reason to expect that a new mailing would arrive.

In Re Longardner & Associates, Inc., 855 F.2d

Appellant's claim as placed in the United States mail was not returned to the sender. See, Supplemental Affidavits of Lynn Solberg (Appdx. p. 402) and Larry B. Leventhal (Appdx. p. 405). Under Longardner, supra, at 460 and Wells Fargo, supra, at 944 the fact that a mailing has not been returned to the sender is significant in proving that the postal item was, indeed, delivered.

In Wells Fargo Business v. Ben Kazloff, Inc., 695 F.2d 940 (1983), the Court found two points of importance as evidence of receipt. First, the sender had repeated the procedure used in a previous mailing that was received by the

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455 (7th Cir. 1988), the Seventh Circuit applied the presumption of receipt upon the showing of a proper mailing. It then stated that the addressee's "denial of receipt alone does not rebut the presumption, but merely creates a question of fact." Id. at 459. The addressee provided no further evidence and his denial was held insufficient to rebut the presumption. The presumption of mailing was strengthened by the fact that the letter was not returned to its sender by the Postal Service.

intended recipient. Second, the sender did not receive a return from the Post Office.

Further, FMC had previously received a mailing from the sender. (Ant. App. 178-179). It is unlikely that the second mailing was not delivered. Under Wells Fargo, supra, at 944, a previous mailing is significant in proving by circumstantial evidence the receipt of a subsequent mailing. Also, it was anticipated at FMC that a claim was to be filed by Appellant. (Appdx. pp. 300-302). Because of the correspondence and telephone contacts between FMC and the office of Appellant's counsel, FMC was not only on notice that the filing would soon be accomplished but FMC gave assistance towards that end. (Appdx. pp. 300-302). The expectation of an intended recipient that a mailing is soon to arrive is an important factor in

establishing proof of receipt, particularly where no inquiry is made as to non-arrival. Solberg, supra, at 1098.

The Court notes that deposition testimony "raises the inference that some FMC officials were aware of a potential or pending claim" (Appdx, p. 43). It was, however, unwilling to rule that receipt had occurred. However, under the reasoning of Longardner, Wells Fargo, Solberg and Hoffman, the Court should have found receipt based on the circumstances proven by Appellant. The District Court insisted that "actual receipt is the standard" (Appdx. p. 40) for filing of FTCA claims. However, no caselaw distinguishes FTCA claims as requiring a higher burden of proof than is the standard case.

The District Court and the Panel abandoned the Supreme Court presumption of

receipt and required an inappropriate burden of proof. In so doing the Courts failed to follow Supreme Court precedent.

CONCLUSION

This is a case of exceptional importance in which the District Court and the Eighth Circuit have significantly departed from Supreme Court and Circuit Court precedent as to several principles of law. The Court should grant certiorari to consider such conflict and to utilize the Courts supervisory powers to adjust for radical departure from established precedent.

Dated this 5th day of October, 1993.

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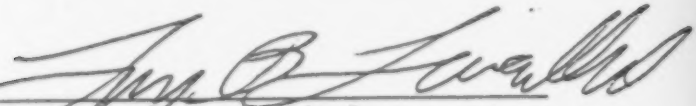
By: 
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